that consequently the city is not liable for the neglect of firemen to perform their duties adequately. *Fisher* v. *Boston*, 104 Mass. 87; *Wheeler* v. *Cincinnati*, 19 Ohio St. 19. And in the similar case of public waterworks, which certainly are not maintained as a matter of private corporate interest, but for the general welfare and protection, it has also been held with great unanimity, in accord with the decision under discussion, that neglect to carry on the work adequately will not support a private action. *Tainter* v. *Worcester*, 123 Mass. 311; *Mendel* v. *Wheeling*, 28 W. Va. 233; *Black* v. *Columbia*, 19 S. C. 412.

It is often said that where a city derives a profit from exercising a particular function, it is playing the part of a private corporation and is liable as such. And accordingly it was contended, in *Insurance Co.* v. *Village of Keeseville*, that the fact of the town's receiving rents from the takers of the water showed that it was a private enterprise. In answering this argument the court points out that "the imposition of water rents is but a mode of taxation, and a part of the general scheme for the purpose of raising revenue with which to carry on the work of government."

It should be borne in mind that the question discussed above is as to the liability of a city for failing to perform, or for performing inadequately, a public duty. A different question arises in considering the liability of the city, not for mere nonfeasance, but for misfeasance in the performance of a duty, causing direct damage to the person or the property of a citizen. *Hill* v. *Boston*, 122 Mass. 344, 358; Dillon on Municipal Corporations, § 966. Many of the cases which seem at variance with *Insurance Co.* v. *Village of Keeseville*, and the principles above set forth, are distinguishable on this ground. See, for example, *Scott* v. *Manchester*, 2 H. & N. 204; *Bailey* v. *Mayor, &c. of New York*, 3 Hill, 531; *Murphy* v. *Lowell*, 124 Mass. 564.

---

Conveyance of an Expectant Estate. — The Kentucky Court of Appeals recently declared that the conveyance by a son of his expectant interest in his father's estate is invalid, even in equity. This decision meets with some support, but is contrary to the weight of authority. The court, while following two previously adjudicated Kentucky cases, also supports its decision by an argument of some length. It points to the generally accepted rule that the conveyance or assignment of a bare possibility is at law invalid, and argues that equity should not contradict the law, especially since the equity courts cannot agree upon a common theory for the enforcement of such a conveyance. It further asserts that to hold the conveyance invalid will be to "save multiplying contentions, protect the improvident children and heirs at law from fraud and deceit, — save free and untrammelled the actions of the possessors of estates in their distribution." *McCall's Adm'r* v. *Hampton*, 32 S. W. Rep. 406 (Ky.).

It is by no means a safe premise that equity should always follow the law; and the argument that, because courts of law will not recognize a conveyance, courts of equity must also decline to recognize it, is unsound. The fact is that most American courts of equity will support such a conveyance, while hardly a court of law will do so. But there is unquestionably much confusion as to the theory on which it is to be supported. Some jurisdictions apply the rules for the conveyance of real property. This leads them into the doctrine of estoppel, with all the confusion that

attends it in this country. Practically all jurisdictions require covenants of warranty, or an equivalent, in order to raise the estoppel, but quarrel on the effect of the estoppel. A Massachusetts decision, *Trull* v. *Eastman*, 3 Met. 121, holds that the estoppel passes the actual title at law. Other courts hold to the apparently sounder view that the covenant of warranty operates as a personal rebutter preventing the grantor from setting up his estate, or "as if a particular averment had been introduced, and the grantor was estopped by his deed from denying its efficacy." See Rawle on Covenants for Title, 3d edition, p. 412, notes 2 and 3. According to this view the grantee's remedy would be purely in equity. Again, the assignment is supported, regardless of the covenant of warranty and its attendant estoppel, not as a conveyance, but as an executory agreement to convey, a present contract to take effect when the estate comes *in esse*, or as creating an equitable ownership to be changed to an absolute property when the son actually inherits. *Bayler* v. *Commonwealth*, 40 Pa. St. 37. In these courts the conveyance of an expectant estate, and a contract for the assignment *in futuro* of personalty not *in esse* at the time of the contract, are regarded in the same light. Such a theory has at least the merit of doing full justice to all parties without violating any principles of law or equity.

In nearly all jurisdictions such conveyances are closely scrutinized, owing to the ready opportunities for fraud. That is one reason why a covenant of warranty is held necessary in so many jurisdictions. Everywhere the grantee must have sufficient consideration. The conveyance is looked upon with favor when it is known and approved by the party from whom the estate is to be derived. To invalidate the conveyance in such a case would be to defeat the intent and interest of all parties. In this case which the Kentucky court had to decide everything is favorable. There is a covenant of warranty, with good consideration, absence of fraud, and assent of the father. Under these circumstances, most courts of equity would hold a son's conveyance of his expectant estate to be valid. See 7 HARVARD LAW REVIEW, 429.

---

INCORPORATION BY REFERENCE — STATUTE OF FRAUDS. — The note or memorandum required by the Statute of Frauds must contain certain terms. If some of those terms are on one paper and others on another, when may the two papers be read together? This question has been answered by the English courts in various ways; at first they were somewhat strict, but for the last twenty years they have adopted a much looser rule. A recent case, however, *Potter* v. *Peters* (72 L. T. Rep. 624), looks rather like a return to the older view.

The whole subject is much confused by talking about parol evidence. The question is said to depend on whether parol evidence is admissible to show what the writing referred to, or under what conditions it was written. The difficulty, however, does not lie with any rule of evidence: there is no rule of evidence which forbids one to introduce both writings or to show all the accompanying circumstances. The real question is, What do these facts, when admitted, prove? Do they furnish a note or memorandum containing the requisite terms? One writing contains the defendant's signature and some of the terms, the other writing (assuming it to be unsigned) contains the lacking terms. Are the circumstances such that the second may be considered as part of the first, so as to con-